

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOSE LUIS VARAS, *Applicant*

vs.

**TERESA LOBATOS;
SEDGWICK BREA, *Defendants***

**Adjudication Number: ADJ2170203
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration¹ to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers’ compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers’ Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).² In light of the district offices’ closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.³ Therefore, the filing deadline

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

² The March 16, 2020 DWC Newline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

³ The April 3, 2020 DWC Newline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020.

Applicant sought reconsideration of the Findings and Award issued by a workers' compensation administrative law judge (WCJ) on February 27, 2020. In that decision, the WCJ found that applicant, while employed on October 26, 1992, as a house painter, sustained admitted industrial injury to his neck, left shoulder, left elbow, left wrist, right upper extremity, low back, right knee, left knee, gastrointestinal (upper/lower G.I.) and psyche, causing 100% permanent disability, and a need for future medical treatment. The WCJ also found the injury caused temporary disability from October 26, 1992 through March 7, 2002, again for 12 weeks after carpal tunnel surgery in 2007, and for an additional 12 weeks following knee surgery on August 13, 2010. The WCJ further found that applicant's weekly earnings for the purpose of calculating temporary disability on the date of injury in 1992 and beyond was \$170.00, based on minimum wage, and awarded temporary disability at the rate of \$126.00 per week for each period of temporary disability. The WCJ awarded an attorney's fee of 15% commuted off the side of the Award and a 15% lump sum for retroactive benefits due.

Applicant contended the WCJ erred by not determining his earning capacity pursuant to Labor Code⁴ section 4453(c)(4) and the statutory increase in the minimum wage to determine his average weekly earnings (AWE). Applicant also contended that his temporary disability rate should have been increased to the current statutory minimum rate under section 4661.5. Applicant's attorney contended that his fee should have included consideration of the disputed temporary disability benefits and the present value of the total permanent disability award. Defendant filed an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ in response to applicant's Petition for Reconsideration, which recommended that the petition be denied.

We have reviewed the record and have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record, for the reasons discussed below and for the reasons stated in the Report, we affirm the February 27, 2020 decision, except that we rescind Finding 4 and paragraph (a) of the Award and return the matter to the WCJ for a new decision with respect to temporary disability benefits.

⁴ All further statutory references are to the California Labor Code, unless indicated otherwise.

FACTS

Applicant, while employed in Los Angeles, California, on October 26, 1992, as a house painter, sustained admitted industrial injury to his neck, left shoulder, left elbow, left wrist, right upper extremity, low back, right knee, left knee, gastrointestinal (upper/lower G.I.) and psyche. The parties disputed injury to urology. Attorney fees were also at issue. Applicant underwent five elbow surgeries, a wrist surgery, and a knee surgery.

The matter proceeded to trial on January 6, 2020.

Defendant paid broken periods of temporary disability indemnity to applicant based on its understanding of applicant's earnings on the date of injury. The parties stipulated that defendant paid compensation as follows: temporary disability at the rate of \$80.00 per week from October 27, 1992 to June 17, 1996; permanent disability at the rate of \$70.00 a week from June 18, 1996 to January 27, 1997; temporary disability at the rate of \$80.00 per week from January 28, 1997 to December 1, 2008; and permanent disability at the rate of \$70.00 a week from December 2, 2008 to April 22, 2015. The parties agreed that defendant has provided some medical treatment, and that the treating physicians were Robert W. Hunt, M.D, and Allen L. Salick, M.D. No arrangement or payment of attorney fees was made.

The issues relevant to the instant petition include applicant's earnings, with applicant claiming \$200.00 per week, and defendant claiming \$120.00 per week; and temporary disability, with applicant claiming October 26, 1992 through the present and continuing. The parties disputed the permanent and stationary (P&S) date, with applicant claiming March 7, 2002 and again on April 29, 2009, based on the reporting of William H. Mouradian, M.D. According to Dr. Mouradian, applicant became permanent and stationary on March 7, 2002, and he became temporarily totally disabled (TTD) in 2007 for 12 weeks following his carpal tunnel surgery. On August 13, 2010, applicant again became TTD for 12 weeks following knee surgery.

Defendant claimed a P&S date of September 23, 1999 based on the opinion of Dr. Hunt.

Applicant testified on his own behalf that he made \$5.00 an hour, worked 40-48 hours weekly, and was paid in cash by the homeowner. He stated he did not receive any documentation from the homeowner, who is now deceased. Applicant did not file a tax return for 1992. Neither party submitted documentation at trial regarding wage payments.

In the February 27, 2020 Findings and Award, the WCJ found applicant was 100% disabled. With respect to applicant's earnings, the WCJ used the minimum wage rate at the time

of injury, \$4.25 per hour, and a forty hour work week, to find an average weekly wage (AWW) of \$170.00. The WCJ awarded applicant the minimum temporary disability rate of \$126.00 per week. The WCJ awarded 15% attorney's fee, payable in a lump sum for accrued benefits and 15% off the side of any future payments.

Applicant sought reconsideration.

DISCUSSION

Initially, we note that when the parties submit an issue regarding a claim for benefits for adjudication, all sub-issues necessary to adjudicate the issue are also raised, whether specifically enumerated or not. In *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689 [74 Cal.Comp.Cases 419] (*Bontempo*), the court held that the issue of permanent disability includes the sub-issue of a permanent disability adjustment under section 4658(d). Thus, the application of the 15% increase in permanent disability benefits in section 4658(d)(2) need not be specifically raised before trial for the WCJ to consider its applicability when calculating the appropriate award of permanent disability benefits, where the record supports its application.

In this matter, the parties raised the issues of applicant's earnings and the dates of his temporary disability. The issue of temporary disability includes the sub-issue of the temporary disability adjustment under section 4661.5. Thus, applicant's failure to specifically raise section 4661.5 as an issue at trial does not constitute a waiver of the issue.

Section 4653 provides that, when a worker is temporarily totally disabled, benefits are payable in the amount of two-thirds of the AWE during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market. Section 4453, subdivision (a) specifies minimum and maximum limits on the amount of AWEs that may be considered for purposes of this calculation. The limits are different for different time periods (see § 4453(a)), and the limits in effect on a worker's date of injury generally apply (§ 4453(d)).

In her Report, the WCJ noted that applicant testified he worked 40 to 48 hours per week. At trial, applicant claimed his AWW was \$200.00, and defendant alleged an AWW of \$120.00. There was no documentary evidence to support either parties' contention. The WCJ applied section 4453(c) to determine applicant's AWW. Section 4453(c) applies when employment is for 30 or more hours per week and for five or more working days a week. The WCJ found an AWW of \$170.00 per week, based on a 40 hour workweek at \$4.25 (minimum wage in 1992). The WCJ

correctly noted that applicant's 100% permanent disability entitles him to indemnity based on the AWW under section 4453, payable for life. (§ 4453.)

With respect to when temporary disability payments are made, section 4661.5 provides,

Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made unless computing the payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings applicable under Section 4453. (Lab. Code § 4661.5)

Thus, any temporary disability payment made two years or more after the date of injury is to be computed in accordance with the limits in effect on the date of payment, not the date of injury. (§4661.5.) We note that section 4661.5 expressly states that it applies only to temporary total disability benefits. Section 4661.5 does not affect the rate of permanent total disability payments paid beyond two years from applicant's permanent and stationary date. (See, *Jansen v. Folgergraphics*, 2017 Cal. Wrk. Comp. P.D. LEXIS 241 (May 31, 2017).

In *Hofmeister v. Workers' Compensation Appeal Board* (1984) 156 Cal.App.3d 848, 852, 49 Cal. Comp. Cases 438 (*Hofmeister*), the second District Court of Appeal found that where a county employee was injured in 1979 and disabled for two years but was not found eligible to receive temporary disability benefits until 1983, four years after the injury, he was entitled to weekly payments based on the statutory rate in effect in 1983, the time of award. He was entitled to the change in benefit rates from 1979 to 1983, an inflationary period, in order to relieve the consequences of his injury.

The Court in *Hofmeister* reasoned that, pursuant to section 4661.5, "when there has been a delay in the payment of temporary disability for two or more years, the weekly earnings amount of such payment shall be at the statutory rate on the date of 'payment.' The statute makes no reference to rates in effect on the date of 'injury.'" (*Hofmeister, supra*, 156 Cal.App.3d at p. 852.) The Court explained that increased rates in indemnity payments were designed to reflect inflationary conditions and that the Legislature had determined that the employer, rather than the injured worker, should suffer the consequences of inflation concomitant with delayed payments. (*Id.* at p. 853.)

In this matter, defendant made partial payments of temporary disability indemnity (\$80.00 weekly, based on an alleged AWE of \$120.00). In *Guindon v. Robertson's Ready Mix*, 2016 Cal. Wrk. Comp. P.D. LEXIS 615,⁵ a panel of the Appeals Board considered the question of partial payments of TDI. In looking at the plain language of section 4661.5, the Appeals Board determined that section 4661.5 applies when “any” portion of a temporary disability payment is made two years or more from the date of injury, “this payment” shall be computed in accordance with the rates in effect at the time that payment is made. Therefore, the temporary disability payments at issue here are subject to section 4661.5 and should not have been calculated on the 1992 date of injury. Instead, temporary disability indemnity must be calculated on the date of payment. The Appeals Board noted this analysis is consistent with the holding in *Hofmeister* and its rationale that the employer, rather than the injured worker, should suffer the consequences of inflation related to delayed payments of temporary disability.

This approach was followed in *Kaiser Foundation Hospital v. Workers' Comp. Appeals Bd. (Mercer)* (2000) 65 Cal.Comp.Cases 567 (writ den.). Applicant, a registered nurse, sustained an admitted industrial injury on November 17, 1994. The parties disputed applicant's post injury earning capacity, post injury temporary disability rate, and section 5814 penalties on temporary disability. The WCJ found that applicant was a member of the California Nurses' Association, and that the Association regularly negotiated pay increases with the defendant. Since applicant was receiving total temporary disability more than two years after the date of injury, and applying section 4661.5, the WCJ determined that the applicant should have received the maximum temporary disability rate as of the time the payments were made, not as of the date of injury. The WCJ also found the defendant unreasonably delayed paying temporary disability indemnity at the correct rate and imposed a section 5814 penalty.

In *Jusufbegovic, v. Fiesta Ford Lincoln Mercury*, 2010 Cal.Wrk.Comp. P.D. LEXIS 418 (Appeals Board panel decision), a majority of the panel found that pursuant to section 4661.5, as interpreted by *Hofmeister*, the applicant with a May 17, 2002 industrial injury was entitled to retroactive temporary disability indemnity payable at the rate in effect at time retroactive payments

⁵ WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [*Griffith v. WCAB* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236].

were made, and that the WCJ had misconstrued the plain language of section 4661.5 by awarding temporary disability at rate in effect at time payments of temporary disability were initially made at incorrect rate based on her finding that, because applicant had previously received partial temporary disability payments, section 4661.5 was not applicable.

Here, the parties stipulated that defendant paid temporary disability indemnity at the rate of \$80.00 per week from October 27, 1992 to June 17, 1996; and from January 28, 1997 to December 1, 2008. (Minutes of Hearing, 1/6/20, p. 2.) Defendant again paid temporary disability indemnity at \$80.00 per week for 12 weeks after applicant's knee surgery on August 13, 2010. California's minimum wage increased in stages from the 1992 rate of \$4.25 to \$8.00 in 2010. At the time of the January 6, 2020 hearing, California's minimum wage had increased to \$12.00 (currently \$14.00) per hour.

We note that applicant was employed in Los Angeles, California, when he was injured. Los Angeles has had a minimum wage rate higher than the state minimum since 2015. Upon return, the parties should consider whether the higher minimum wage in Los Angeles applies to determine applicant's temporary disability rate.

Applicant's counsel is entitled to a 15% fee on any amounts due above and beyond what was already paid to applicant, in temporary disability benefits. This fee is to be subtracted from amounts payable to applicant. On this record, no commutation of future fees has been requested although it appears that applicant's attorney may seek a commutation of fees. Jurisdiction is reserved at the trial level over any fee disputes.

Accordingly, for these reasons, we rescind Finding 4 and paragraph (a) of the February 27, 2020 decision, and return only the issue of temporary disability indemnity to the WCJ for further proceedings and decision. Pursuant section 4661.5 and *Hofmeister*, temporary disability indemnity shall be calculated to reflect that temporary disability indemnity payments, made more than two years from the date of injury, are paid at the rate in effect at the time of payment.

For the foregoing reasons,

IT IS ORDERED as our Opinion and Decision After Reconsideration, Finding 4 and paragraph (a), issued February 27, 2020, are **RESCINDED** and the matter shall be **RETURNED** to the trial level for further proceedings consistent with this opinion and for a new final decision from which any aggrieved party may seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 11, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**JOSE LUIS VARAS
MOISES VAZQUEZ, ESQ.
LAW OFFICE OF ALAN FREEMAN**

MJG/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*